Editor's note: Reconsideration denied by Order dated Oct. 2, 1990.

WESTON B. ANDREWS

IBLA 88-606 Decided September 5, 1990

Appeal of a decision of the Alaska State Office, Bureau of Land Management, rescinding a decision to issue a noncompetitive oil and gas lease, cancelling the lease, and rejecting the offer to lease. AA 67830.

Affirmed as modified.

1. Oil and Gas Leases: Cancellation

   The Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates. When a lease has been issued in violation of the terms of a regulation promulgated pursuant to statutory authority to the prejudice of the rights of others, it is properly cancelled.

2. Alaska: Land Grants and Selections--Oil and Gas Leases: Cancellation--Oil and Gas Leases: Lands Subject to

   Oil and gas lease offers filed for land embraced in an Alaska State selection pursuant to sec. 6(b) of the Alaska Statehood Act of 1958 will be rejected when and if the selection is tentatively approved. Where an oil and gas lease has inadvertently been issued for land embraced in an outstanding selection, a decision cancelling the lease after a determination has been made to approve the selection will be affirmed on appeal.

APPEARANCES: Weston B. Andrews, Chesterfield, Missouri, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Weston B. Andrews has appealed a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 4, 1988, which rescinded the prior decision to issue noncompetitive oil and gas lease AA 67830 to him effective August 1, 1985. The decision appealed from cancelled the lease and rejected his lease offer.

BLM determined that the State of Alaska's selection application FF-84394 filed on September 17, 1984, had segregated the land "from further use until the application has been approved or denied." The BLM decision

noted that the State selection had been found to be appropriate for tentative approval by decision of June 29, 1988. Accordingly, BLM concluded that the lease had been issued in error and informed appellant that "the decision to lease is hereby rescinded and the lease cancelled." The decision also noted that appellant's rental payment would be refunded. Having rescinded its decision to issue the lease, BLM purported to reject the lease offer pursuant to the regulation at 43 CFR 2627.3(b)(2).

In appellant's statement of reasons for appeal, he challenges the propriety of the State's selection application, raising questions as to the State's compliance with the regulations regarding payment of the filing fee, publication of notice of the selection, and the cumulative acreage allowed in selections. In addition, appellant alleges that BLM erred in failing to timely notify him of the pending State selection and that to allow cancellation of the lease at this time would be unconscionable.

Appellant's lease embraces approximately 640 acres consisting of unsurveyed sec. 23, T. 28 N., R. 19 W., Kateel River Meridian. The township had been withdrawn in 1972 from appropriation under the public land laws, mineral location, mineral leasing, and selection by the State of Alaska by Public Land Order No. (PLO) 5179. 37 FR 5579, 5580 (Mar. 16, 1972). How-ever, in 1981 PLO 6092 opened the township for selection by the State. 46 FR 57048, 57049 (Nov. 20, 1981). Effective November 9, 1983, PLO 6477 made the land available for "applications and offers under the mineral leasing laws" as well as mineral location and selection by the State of Alaska. 48 FR 45395, 45396, 45400 (Oct. 5, 1983).

The record discloses that the tract of land at issue was included in an Alaska State selection, pursuant to section 6(b) of the Alaska Statehood Act of July 7, 1958, P.L. 85-508, 48 U.S.C. note prec. § 21 (1982), and section 906 of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 43 U.S.C. § 1635 (1982), filed with BLM on September 17, 1984. Subsequently, on December 26, 1984, appellant filed his lease offer. On July 26, 1985, the lease form was signed by the authorized officer and lease AA 67830 was issued effective August 1, 1985. Thereafter, by Notice dated May 21, 1986, BLM informed appellant that the lease was suspended effective as of that date due to the preliminary injunction issued December 4, 1985, in National Wildlife Federation v. Burford. 1/ Approximately 3 years later, BLM issued the decision under review.

1/ 676 F. Supp. 271 (D.D.C. 1985), modified, 676 F. Supp. 280 (D.D.C. 1986), aff'd, 835 F.2d 305 (D.C. Cir. 1987), motion for summary judgment granted, 699 F. Supp. 327 (D.D.C. 1988), rev'd, 878 F.2d 422 (D.C. Cir. 1989), rev'd, 58 U.S.L.W. 5077 (U.S. June 27, 1990) (No. 89-640). The basis for suspending the lease appears questionable in view of the fact that lease issuance predated the injunction. See 835 F.2d 305 at 315 (injunction does not invalidate existing mineral leases). In any event, the defendant's motion for summary judgment was subsequently granted and the case was dismissed for lack of standing. 58 U.S.L.W. 5077. Accordingly, the issue of the injunction is now moot.

Appellant contends that the State selection should not be approved because of the alleged failure of the State to comply with relevant regulations. Appellant argues that the State selection application "does not clearly show a filing fee physically accompanied the application." The regulation requires a filing fee. 43 CFR 2627.3(c)(2). However, the copy of the State selection file enclosed as part of the record before the Board reflects that a filing fee was received simultaneously with the State selection.

Appellant further challenges the cumulative acreage reflected on the State selection as exceeding by over 9.5 percent the amount allowed under the regulation at 43 CFR 2627.3. In this regard we note that the State selection application shows an "approximate cumulative acreage" of 113,415,510 acres. The regulation at 43 CFR 2627.3 referred to by appellant notes that the Alaska Statehood Act of July 7, 1958, authorizes the selection of 102,550,000 acres. Subsequent to the promulgation of this regulation, the Alaska Statehood Act has been amended to allow the State of Alaska to "overselect" by not more than 25 percent. Section 906(f), ANILCA, 43 U.S.C. § 1635(f) (1982). The State selection application explicitly referenced this statutory authority. Accordingly, we are unable to conclude that appellant has shown that the State selection application is ineligible for tentative approval on the basis of this issue.

Appellant also challenges the publication of notice of the State selection application, asserting that the publication of notice on Mondays rather than Wednesdays violated the regulation at 43 CFR 1824.3 and results in termination of the segregative effect of the State selection under 43 CFR 2627.4(b). The regulation at 43 CFR 2627.4(c) requires publication "once a week for five consecutive weeks in accordance with § 1824.4 [2/] of this chapter." The regulation at 43 CFR 1824.3 allows the applicant to reduce expenditures in a situation where publication is required in a daily news-paper for a period of 30 or 60 days by allowing publication once a week on Wednesdays for 5 or 9 consecutive weeks, respectively. In the case of State selection applications, publication is not required for a period of 30 or 60 days, but, rather, once a week for 5 consecutive weeks. This is what was done and, in these circumstances, we do not find that the regulation compels publication on Wednesdays. Accordingly, appellant has not persuaded us of the impropriety of the State selection application and we think the critical question is whether, under the circumstances, appellant's lease was properly cancelled.

As a threshold matter, we find the issue is not whether BLM could properly reject appellant's lease offer under the regulations, but whether appellant's lease may be cancelled under the circumstances. The lease was issued to appellant in 1985. "The Department has recognized that upon signature of a lease by both parties, it becomes a binding instrument and cannot be vitiated by unilateral action, all else being regular." Carl J. Taffera, 71 IBLA 72, 76 (1983), quoting Barbara C. Lisco, 26 IBLA 340, 344

2/ Former regulation 43 CFR 1824.4 was redesignated as 43 CFR 1824.3 effective June 13, 1970. 35 FR 9502 (June 13, 1970).

(1976). Factors which would justify rejection of a lease offer in the public interest in the exercise of the Secretary's discretionary authority over leasing may not suffice to justify cancellation of a lease previously issued. Joan Chorney, 108 IBLA 43 (1989), rev'd on other grounds, Joan Chorney (On Reconsideration), 109 IBLA 96 (1990); see Carl J. Taffera, supra at 71.

[1] On the other hand, it is well established that the Secretary of the Interior has the authority to cancel any lease issued contrary to law because of the inadvertence of his subordinates. Boesche v. Udall, 373 U.S. 472 (1963); Hanes M. Dawson, 101 IBLA 315 (1988); D. M. Yates, 74 IBLA 159 (1983); Fortune Oil Co., 69 IBLA 13 (1982). As the Board stated in D. M. Yates, supra at 161:

> Appellant contends that Boesche v. Udall, supra, cited by BLM as authority for the cancellation of his lease * * * does not in fact authorize such a postlease cancellation. Boesche v. Udall, supra, however, observes that whereas section 31 of MLA [Mineral Leasing Act, as amended, 30 U.S.C. § 188 (1982)] reaches only cancellations based on postlease events, it leaves unaffected the Secretary's traditional administrative authority to cancel on the basis of the prelease factors. In fact, Boesche clearly states that the Secretary should have the power to correct his own errors. Boesche v. Udall, supra, at 478.

Where a lease has been issued in violation of the terms of a relevant statute or Departmental regulations promulgated thereunder to the prejudice of the rights of others, it is properly cancelled. Bernard Kosik, 70 IBLA 373 (1983); see McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). 3/

[2] The BLM decision held that the land embraced in appellant's lease was segregated by the State selection filed prior to appellant's lease application. The regulations governing the segregation of lands authorized for selection and selected by the State of Alaska are found at 43 CFR Subpart 2627. 43 CFR 2091.9-2. The regulation cited by BLM in its decision provides in pertinent part:

> Under the Act, [4/] the State may select any vacant, unappropriated, and unreserved public lands in Alaska, whether

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3/ Although cancellation to rectify administrative error in issuing the leases has generally been limited to cases where the lease was issued in contravention of a specific regulatory mandate, the Secretary is not bound by the unauthorized acts of his subordinates, 43 CFR 1810.3, and there is support for cancellation of a lease in the absence of violation of a regulation where the lease was issued without authority, contrary to established Secretarial policy. See McKay v. Wahlenmaier, supra at 42 n.11; John Bloyce Castle, 81 IBLA 53, 56-57 (1984) (Burski, A.J., concurring).

4/ The "Act" is defined in the regulation to include that part of the Act of July 7, 1958, which authorizes the selection of "not to exceed

> or not they are surveyed and whether or not they contain mineral deposits. * * * Conflicting applications and offers for mineral leases and permits, except for preference right applicants, filed pursuant to the Mineral Leasing Act, whether filed prior to, simultaneously with, or after the filing of a selection under this part will be rejected when and if the selection is tentatively approved by the authorized officer of the Bureau of Land Management * * *.

43 CFR 2627.3(b)(2). 5/ This regulation has consistently been held to require rejection of even those oil and gas lease offers filed prior to a State selection application when a decision is made to tentatively approve the State selection. See, e.g., Richard W. Rowe, 20 IBLA 59, 75-76, 82 I.D. 174, 181 (1975), aff'd sub nom. Rowe v. Hathaway (Civ. No. 75-1152 (D.D.C. 1976)). 6/ A fortiori, rejection of a lease offer filed subsequent to the State selection is required when a determination is made to issue tentative approval of the State selection. It is clear from the record that BLM has now made that determination.

The precise issue presented by this appeal, however, is whether the effect of 43 CFR 2627.3(b)(2) is to prohibit issuance of an oil and gas lease during the pendency of a State selection application. None of the Departmental precedents are directly on point. The only case which raised this question, Standard Oil Company of California, 71 I.D. 1 (1964), expressly refused to state an opinion thereon. Id. at 2 n.2. Nor is there any regulatory history upon which to predicate a conclusion. We must be guided, therefore, by the plain wording of the regulation, read in the light of the well-established principle that an offer to lease oil and gas deposits grants no vested rights to the applicant beyond priority of consideration should it be determined to issue a lease. See, e.g., Schraier v. Hickel, 419 F.2d 663 (D.C. Cir. 1969).

The regulation clearly provides that upon approval of a pending State selection application, an oil and gas lease application is to be rejected, even if that application was filed prior to the selection application of the State. This provision, in and of itself, clearly assumes that the selection application of the State was to be accorded priority in consideration since,

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fn. 4 (continued)
102,550,000 acres from the public lands in Alaska which are vacant, unappropriated and unreserved at the time of selection." 43 CFR 2627.3(a). This definition corresponds to section 6(b) of the Alaska Statehood Act of July 7, 1958, as amended, 48 U.S.C. note prec. § 21 (1982).

5/ The terms of this provision of the regulations, although recodified, have remained virtually unchanged since this regulation was initially promulgated pursuant to the Statehood Act. See 43 CFR 76.12(b), 24 FR 1864-65 (Mar. 14, 1959) (proposed); 43 CFR 76.12(b), 24 FR 4658 (Jun. 9, 1959) (final).

6/ The Rowe decision also noted that a pending noncompetitive oil and gas lease offer did not constitute a preference right application within the meaning of the exception in the regulation at 43 CFR 2627.3(b)(2).

if the applications were considered in the chronological order of their filing, there would never be a situation in which an earlier filed oil and gas lease application would still be pending when tentative approval was granted
to a State selection. Thus, unless it was the intent of the regulation to prohibit approval of pending oil and gas lease applications until such time as a conflicting State selection application was adjudicated, this provision of the regulation would have no utility.

Since issuance of any oil and gas lease is clearly within the discretionary authority of the Department, this regulation must be read as a Secretarial exercise of authority to prohibit adjudication of all pending or subsequently filed oil and gas lease applications upon the filing of a State selection application until such time as the State selection application was either tentatively approved (at which point the oil and gas lease application was to be rejected) or rejected (at which point the regulatory bar to issuance of the oil and gas lease would be removed). Thus, the issuance of an oil and gas lease in the instant case, at a time when the State selection application was still pending, constituted direct action in derogation of the proscription of 43 CFR 2627.3(b)(2). Under the circumstances of this case, where BLM has determined to issue tentative approval of the State selection for the lands involved, the decision to cancel the lease which was improperly issued under the regulations must be affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is affirmed as modified.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James L. Burski
Administrative Judge